U.S. Department of Labor

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Issue Date: 26 May 2004

CASE NO. 2003-AIR-00047

In the Matter of:

RICHARD HIRST,
Complainant

V.

SOUTHEAST AIRLINES,
Respondent

Appearances:

Gary Linn Evans, Esq.,
Coats & Evans, P.C.

For Complainant,

Michael V. Abcarian, Esq.,
Epstein Becker Green Wickliff & Hall, P.C.

For Respondent,

Before:

Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"), as implemented by 29 C.F.R. Part 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

I. Background

Procedural Background

On October 24, 2002, the Complainant, Richard V. Hirst, filed a complaint with the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"), alleging that on September 29, 2002 Respondent Southeast Airlines, Inc. ("SEAL") had terminated his employment as a pilot in retaliation for his raising safety concerns with SEAL on September 29, 2002, and in which he alleged that Respondent had thereby discriminated against him in violation of Section 42121 of the Act. OSHA conducted an investigation and found that Complainant had not been discharged by SEAL, but rather had voluntarily resigned from employment. Following a denial of his claim on July 29, 2003 by the Regional Administrator of OSHA, Complainant requested a hearing by an administrative law judge pursuant to 29 C.F.R. § 1978.105(a) on September 6, 2003. The case was assigned to the undersigned on October 2, 2003. A hearing was held in this matter on December 1 and 2, 2003, in Dallas, Texas, at which time all parties were afforded a full and fair opportunity to present evidence and arguments. Both Complainant and Respondent were represented by counsel. Administrative Law Judge Exhibits ("AX") 1-7, Complainant's Exhibits ("CX") 1-13 and 15-28, and Respondent's Exhibits ("RX") 1-5 were admitted into the record. Complainant, Robert E. Streble, Roger Walden, James Ford, David B. Lusk, Steven Malone, and Jack O'Brien testified at the hearing. Both parties requested and were given the opportunity to present post trial briefs which were received by the undersigned on March 19, 2004.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent.

Factual Background

Complainant holds an Airline Transport Pilot Certificate issued by the Federal Aviation Administration ("FAA") and has type ratings in Boeing 727, 737, and DC-9 aircraft. Complainant was hired by SEAL in July of 2002 to pilot DC-9 aircraft operated by SEAL in connection with its charter air service operation. (Hearing Transcript ["Tr'], p. 341). On September 29, 2002, Complainant was instructed to pilot SEAL's Flight 556 from Fort Lauderdale, Florida to Newark, New Jersey. (Tr, p. 370). The Captain of the inbound flight advised Mr. Hirst that SEAL had increased the maximum gross weight of the aircraft from 105,000 pounds to 108,000 pounds. (Tr, p. 370). Complainant had neither seen a bulletin regarding this increase in gross weight nor had he been issued a temporary revision for his flight manual reflecting such an increase in gross weight. (Tr, p. 370). Upon failing to find any such documentation aboard the aircraft to confirm the increase in gross weight, Complainant called the SEAL dispatcher to question the legality of flying the aircraft at the increased weight of 108,000 pounds. (Tr, pp. 372-374). After some consternation on the dispatcher's part, the dispatcher advised Mr. Hirst that he would have Captain Steve Malone contact Complainant to discuss the situation. (Tr, p. 376). Captain Malone subsequently called Mr. Hirst and advised Mr. Hirst that he was confident that the aircraft's gross weight had been correctly increased and that

the flight at the increased weight was in compliance with FAA regulations. (Tr, pp. 486-487). Complainant requested that Captain Malone have someone fax to him copies of the appropriate documents to verify that the increase in gross weight complied with FAA regulations. (Tr, p. 389). Captain Malone told Mr. Hirst that he should follow his orders and fly the aircraft. (Tr, p. 390). When Complainant refused to fly the aircraft without documentation of the increased weight being in compliance with FAA regulations, Captain Malone advised Complainant to report to SEAL's offices the next day to turn in his manuals and identification. (Tr, p. 391). Complainant turned in his manuals and company identification on September 30, 2002, to Chief Pilot, David B. Lusk, at SEAL's office. In a phone conversation two days later, Mr. Lusk advised Complainant of SEAL's decision not to fire him and offered his job back. (Tr. P. 421). Mr. Lusk confirmed this conversation in a letter to Complainant dated October 3, 2002, and requested a response within three days of receipt of the letter with his intentions. RX 2. On October 14, 2002, Complainant replied that his employment was terminated by SEAL on September 29 and 30th, and at no time did he resign, abandon, or in any manner terminate his employment as a Captain. RX 3; CX 6.

II. Issues for Adjudication

The issues to be determined in a claim of discrimination under the employee protection provision of the Act normally include:

1. Whether Respondent is an air carrier subject to AIR 21?

2. Whether Complainant engaged in activities which are protected by AIR 21?

3. Whether Respondent actually or constructively knew of, or suspected, such activity?

4. Whether Complainant suffered an unfavorable personnel action?

5. Whether Complainant's activity was a contributing factor in the unfavorable personnel action?

6. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the unfavorable personnel action irrespective of Complainant's having engaged in protected activity?

7. Whether Complainant is entitled to relief, and if so, what relief?

In the present case, there is no dispute that SEAL is an air carrier subject to AIR 21 and that Complainant engaged in protected activity known to SEAL. Thus, the actual issues to be decided herein are:

1. Whether Complainant suffered an unfavorable personnel action?

2. If so, whether Respondent made a bona fide offer of reinstatement to Complainant?

3. Whether Complainant is entitled to relief, and if so, what relief?

III. Conclusions of Law

This is a trial *de novo* rather than an appeal from OSHA's findings. AIR 21 is relatively new, with little decisional law applying it.

The employee protection provisions in the Act are rooted in bills introduced as the Aviation Safety Protection Act of 1997 in the House of Representatives as H.R. 915, 105th Cong., 1st Sess. by Reps. Sherwood Boehlert and James Clyburn, and introduced in the Senate by Senator John F. Kerry as S. 100, 105th Cong., 1st Sess. The House recognized that "private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory action by over a dozen federal laws," but that "there are no laws specifically designed to protect airline employee whistleblowers." House Committee Report No. 639, 105th Cong., 2nd Sess. 51, July 20, 1998. After Senator Kerry's bill was merged into S. 2279, a Senate committee report found the whistleblower provisions "would provide employees of airlines, and employees of airline contractors and subcontractors, with statutory whistleblower protection. . . The language in this section is similar to whistleblower protection laws that cover employees in other industries, such as nuclear energy" (S. Rep. No. 278, 105th Cong., 2d Sess. 4, 22, July 30, 1998).

Neither bill survived the conference committee, as language from S. 2279 went on to become S. 648, 106th Cong., 1st Sess., the Aviation Safety Protection Act. Senator Kerry explained the rationale for the bill in this way when he introduced it for himself and Senator Grassley on March 17, 1999:

> The Occupational Safety and Health Act (OSHA) properly protects both private and federal government employees who report health and safety violations from reprisal by their employers. However, because of a loophole, aviation employees are not covered by these protections. Flight attendants and other airline employees are in the best position to recognize breaches in safety regulations and can be the critical link in ensuring safer air travel. Currently, those employees who work for unscrupulous airlines face the possibility of harassment, negative disciplinary action, and even termination if they report violations. Aviation employees perform an important public service when they choose to report safety concerns. No employee should be put in the position of having to choose between his or her job and reporting violations that threaten the safety of passengers and crew. For that reason, we need a strong whistleblower law to protect aviation employees from retaliation by their employers when reporting incidents to federal authorities. Americans who travel on commercial airlines deserve the safeguards that exist when flight attendants and other airline

> employees can step forward to help federal authorities enforce safety laws.

145 Cong. Rec., S2855 (March 17, 1999).

Reps. Boehlert and Clyburn continued their efforts in the House, introducing H.R. 953 in the 106th Congress, which when amended became H.R. 1000, the "Wendell H. Ford Aviation Investment and Reform Act for the 21st Century." (AIR 21) (H.R. Conf. Rep. No. 106-513, 106th Cong., 2d Sess., March 8, 2000). Senate bills S. 648 and S. 1139 were incorporated into S. 82 on March 8, 2000. (S. Rep. No. 9, 106th Cong., 1st Sess.). Based upon compromise in conference, AIR 21 emerged from these bills and became law on April 5, 2000 as Public Law 106-181, codified as 49 U.S.C.A. § 42121 (2003). *See,* 2000 U.S. Code Cong. and Admin. News p. 80.

The employee protection provisions of AIR 21 remained similar to those enacted in the Energy Reorganization Act of 1974, as amended in 1992, 42 U.S.C.A. § 5851 (ERA), and the Clean Air Act, 42 U.S.C.A. § 7622 (2003) (CAA). Like them, AIR 21 confers broad authority on the Secretary of Labor to order abatement of any violations.

The employee protection portion of AIR 21, 49 U.S.C.A. § 42121 (2003), reads:

> (a) No air carrier. . . may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

The AIR 21 whistleblower provisions contain the same statutory burden of proof standards that are included in the ERA whistleblower provisions. Where a case has been fully tried on the merits, the relevant inquiry is whether the employee provided by a preponderance of the evidence an ultimate question of liability. See *Carrol v. Bechtel Power Corp.,* 1991-ERA-46 slip op. at 9-11 (Sec'y Feb. 15, 1995), aff'd *Carrol v.U.S. Dept.of Labor,* 78 F.3d 352 (8 Cir. 1996); 42 U.S.C. §42121(b)(2)(B)(iii).

Thus, the employee has the initial burden to prove that: (1) he engaged in a protected activity; (2) he was subjected to an adverse employment action; and (3) evidence raises a reasonable inference that the protected activity likely contributed to the employer's decision to take the adverse action. 49 U.S.C.A. §42121(b)(2)(B)(i) and (iii) (2003); 29 C.F.R. § 1979.104(a), (b)(1-2) (2003); *see also Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999).

The employer then must demonstrate by clear and convincing evidence that it would have taken the unfavorable personnel action in the absence of the employee's protected activity. *Trimmer*, 174 F.3d at 1102. "Clear and convincing" evidence is more than a preponderance of the evidence but less than proof "beyond a reasonable doubt." *See Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12 (Sec'y May 24, 1995).

When the employer produces a legitimate, nondiscriminatory reason for its employment decision, the employee must prove by a preponderance of the evidence that the proffered reasons are "incredible and constitute a pretext for discrimination." *Overall v. Tenn. Valley Auth.*, 1997-ERA-53 at 13 (ARB Apr. 30, 2001).

Protected Activity

A complainant must demonstrate that he engaged in protected activity under the Act. Reporting something the complainant reasonably believes has violated an underlying substantive act (whether dealing with nuclear safety, environmental protection, etc.) is a "protected activity." *Davis v. United Airlines, Inc.,* 2001-AIR-5, at 10 (ALJ July 25, 2002).

The undersigned is also guided by secretarial decisions on what action constitutes a protected activity under similar whistle blowing statutes. Protected activity, under the environmental acts, is broadly defined as a report of an act which complainant reasonably believes is a violation of the environmental acts, as long as the complaint is grounded in conditions constituting reasonably perceived violations. *See Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 1. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard,* 92-SWD-1, slip op. at 8. In other words, the standard involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In *Minard*, the Secretary indicated the complainant must have reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v Westinghouse Hanford Co.*, 91- SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). If a complainant had a reasonable belief that the respondent was in violation of an environmental act, that he or she may have other motives for engaging in protected activity is irrelevant. The Secretary concluded that if a complainant is engaged in protected activity which "also furthers an employee[']s own selfish agenda, so be it." *Carter v. Electrical District No. 2 of Pinal County*,

92-TSC-11 (Sec'y July 26, 1995) (some evidence indicated that Complainant's motives were to retaliate because of a wage dispute with a new manager).

The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of the applicable environmental statutes. *Goldstein v. Ebasco Constructors Inc.*, Case No. 86-ERA-36 (Sec'y Dec. and Order April 7, 1992), *rev'd sub. nom*,. *Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 16, 1993)(per curiam); *Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987); *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. and Order April 29, 1983). Reporting safety and environmental concerns under CERCLA internally to one's employer is protected activity. *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994); *see also Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993)(addressing internal complaints under TSC complaint); *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996)(addressing internal complaints under CERCLA). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987)(order of remand). The report may be made to a supervisor, through an internal complaint or quality control system, or to an environmental staff member. *Williams v TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

The Secretary has also held the questioning of safety procedures as protected activity. In *Sprague v. American Nuclear Resources, Inc.,* 92-ERA-37 (Sec'y Dec. 1, 1994), the secretary held that complainant engaged in protected activity when he questioned radiation protection personnel about what was happening during a radiation test, and then asked for a copy of the results. See also *Bechtel Construction Co. v. Secretary of Labor,* 50 F.3d 926 (11th Cir. 1995) (Complainant's questioning of a supervisor's instructions on safety procedures was tantamount to a complaint); *Dysert v. Westinghouse Electric Corp.,* 86-ERA-39 (Sec'y Oct. 30, 1991), slip op. at 1-3 (employee's complaints to team leader about procedures used in testing instruments is protected internal complaint under the ERA.)

Additionally, to constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). The whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns about safety issues that rise to the level of a complaint constitutes protected activity. *Bechtel Construction Co.,* 50 F.3d at 931. Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. *Id*. Where the complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9.

Therefore, protected activity under AIR21 has two elements: 1) the complaint must involve a purported violation of an FAA regulation, standard, or order relating to air carrier safety; and 2) the complainant's belief about the purported violation must be objectively reasonable. See *Parshley v. America West Airlines*, 2002-AIR-10 (ALJ Aug. 5, 2002), slip op. at 59.

Based on the evidence in the record and applicable law, the undersigned finds there is substantial evidence that Mr. Hirst's complaint constituted protected activity. First, there is no genuine dispute as to whether Mr. Hirst's conduct was protected activity. (Tr, p. 281). On September 29, 2002, Mr. Hirst raised safety concerns to Captain Malone regarding the legality of flying the aircraft at the increased weight of 108,000 pounds. (Tr, pp. 372-374). Mr. Hirst's conduct constituted an internal complaint with an employer as he questioned a safety procedure that purportedly violated an FAA regulation, standard, or order relating to air carrier safety.

Regulations obliging pilots to record or report irregularities engender conflicts with managers trying to ensure on time performance, and maximize the number of revenue legs flown; management goals suffer when recorded deficiencies have to be corrected. *See generally,* John J. Nance & Charles David Thompson, *The Pilot Records Improvement Act of 1996: Unintended Consequences*, 66 J. Air L. & Com. 1225 (2001). Traditionally, a pilot facing the dilemma of reporting irregularities or antagonizing management could resign or accept termination rather than comply with pressure to overlook dangerous conditions. Before 1996, a pilot who resigned or was terminated in these circumstances could apply to another air carrier and give his explanation for the previous job separation or loss. *See* Nance & Thompson, *supra*, at 1226-28. The Pilot Record Improvement Act of 1996 (PRIA) complicates the pilot's situation, for PRIA requires air carriers to report the records of former employees to prospective airline employers. 49 U.S.C.A. § 44703(h)(1) (2003). An unfavorable entry in the employment record, especially one that an air carrier terminated the pilot for "unsatisfactory performance," becomes permanent and public, with little meaningful opportunity for explanation, and potentially ruinous consequences for honest and competent pilots. *Id*.; Nance &Thompson, *supra* at 1236.

The statutes and regulations governing air commerce assign safety the highest priority. *See* 49 U.S.C.A. § 40101(a)(1) and (3), (d)(1) (2003). PRIA minimizes the possibility that a pilot with dangerously flawed judgment may obtain employment with an airline that does not know about earlier instances of incompetence, by making pilots' personnel files available to later potential employers. AIR 21 serves as a sort of counterbalance. It promotes safe air commerce by protecting pilots (and other airline employees) from implicitly or overtly coercive memoranda placed in their personnel files to discourage reports about deficiencies in operations or equipment. Both PRIA and AIR 21 reflect the central position pilots occupy in implementing the Congressional policy of making air travel as safe as possible.

Federal law confers great responsibility on a pilot in command, and commensurate authority. "The pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft." FAR 91.3. The pilot has a non-delegable duty to ensure an aircraft is airworthy, for FAR 91.7 says:

> **Civil aircraft airworthiness**. (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

As pilot in command, Mr. Hirst had "final authority and responsibility for the operation and safety of the flight." FAR 1.1, see also FAR 91.3, supra. He bore an ultimate responsibility for operational control of the aircraft (along with the aircraft dispatcher); and for the safety of the passengers, crew and aircraft. FAR 121.533, (e). This responsibility explicitly requires the pilot in command to ensure compliance with regulations and operations specifications, see FARs 121.535(b), 121.537(b).

Captain Malone likely understood that Mr. Hirst's concern for safety and quality conflicted with SEAL's goals, because it caused SEAL expense and delay. Captain Malone directed Mr. Hirst to fly the aircraft, based on his oral assurances of compliance with the regulations. This situation embodies the concerns that led Congress to extend whistleblower protection to air carrier employees, to protect them from retribution for engaging in protected activity. FAA regulations require the pilot in command to ensure rather than assume that all is well with the aircraft, and thereby protect the safety of the passengers, crew and aircraft. No other officer or employee of an airline may interfere with that non-delegable duty.

Second, the undersigned finds Mr. Hirst engaged in protected activity because complainant's belief regarding the purported violation was objectively reasonable. It has been established and is not contested that Mr. Hirst believed that operating the aircraft, in excess of its maximum certified takeoff weight would have been a safety violation. SEAL's operations manual, an approved FAA document, serves as a guide for its pilots as it contains a description of the aircraft, including its weight, speeds and operation abilities. (Tr, pp. 271-272). On September 29th, the operations manual did not reflect the purported increase in weight, leading to the inference that the change had yet to be approved by the FAA. (Tr, p. 370). After discussing the situation with both a SEAL dispatcher and Captain Malone, Complainant was given oral assurances of the aircraft's safety and was advised to follow orders and fly the aircraft. (Tr, pp. 486-7). However, oral assurances were not suitable to Mr. Hirst, and his subsequent requests for documentation of the increased weight being in compliance with the FAA regulations were denied.

The testimony of Jack O'Brien, the former Director of Safety at SEAL, further confirms that Mr. Hirst's beliefs were objectively reasonably. O'Brien advised Complainant that if there was any doubt whatsoever regarding the maximum certified gross takeoff weight for the aircraft, he would advise him not to operate the aircraft above 105,000 pounds. (Tr, p. 558). O'Brien testified "It is up to the captain to keep himself legal, to know his regulations. He's responsible for the aircraft and its people and that's his job. If he thinks it's unsafe, don't go." (Tr, p. 562).

The absence of any documentation reflecting the increase in gross weight and O'Brien's advice to Complainant about his responsibilities as a captain, compels the undersigned to find Complainant's beliefs objectively reasonable.

Thus, the undersigned finds Captain Hirst has satisfied the initial burden of proving that he engaged in protected activity.

SEAL's Adverse Employment Actions

Complainant must next demonstrate, by a preponderance of the evidence, that SEAL's action had some adverse impact on his employment. *See Trimmer,* 174 F.3d at 1103, citing, *Montandon v. Farmland Indus., Inc.,* 116 F.3d 355, 359 (8th Cir. 1997). Under AIR 21, employers are prohibited from taking unfavorable personnel action against employees because they have engaged in protected activity. Such actions include discharge or other discrimination with respect to compensation, terms, conditions or privileges of employment. 49 U.S.C.A. §42121(a). The regulations also forbid air carriers "to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee" who has engaged in protected activity. *See* 29 C.F.R. § 1979.102(b) (2003). *See also,* 29 C.F.R. § 24.2(b) (2003) (adopting similar definitions under similar whistleblower protection statutes).

Mr. Hirst argues he suffered an adverse personnel action when SEAL terminated his employment. Complainant contends Captain Malone's conduct of instructing him to turn in his company manual and identification, and repeatedly telling Mr. Hirst he was "off the payroll", constituted the termination of his services as captain. Furthermore, Mr. Hirst argues an inquiry five days later, as to whether he would be returning to work did not constitute a bona fide offer of re-employment. On the other hand, SEAL contends it did not terminate Mr. Hirst's employment as a captain, because he voluntarily quit. Respondent argues that no one ever communicated to Mr. Hirst that his employment was terminated, rather SEAL addressed his concerns and subsequently attempted to schedule Mr. Hirst for flight duty. Furthermore, SEAL considered Mr. Hirst a voluntary quit as he failed to indicate his intent to continue employment with SEAL. In light of the evidence in the record, the undersigned finds Mr. Hirst did not abandon or quit his position as a pilot, rather he was terminated by SEAL.

First, Captain Malone terminated Mr. Hirst's employment when he instructed him to turn in his company identification and manuals on September 29, 2002. (Tr, p. 392). When Mr. Hirst requested his counsel attend the meeting, Malone refused to entertain such a meeting and told him "You're off the payroll." (Tr, p. 402). Following his conversation with Captain Malone, Mr. Hirst testified he felt like he had been terminated. (Tr, p. 395). In addition, SEAL did not provide Mr. Hirst transportation back to his home base in St. Petersburg. (Tr, p. 399). Mr. Hirst testified had he still been employed by SEAL at the time, they would have provided him with transportation back St. Petersburg. (Tr, p. 399). Furthermore, on September 30th, Mr. Hirst turned in his manuals and identification to Chief Pilot David Lusk, was given his paycheck and asked to leave the property. (Tr, p. 419). At the conclusion of his meeting with Chief Lusk, Mr. Hirst testified that he had no doubt that he had been terminated. The fact that Mr. Hirst was required to turn in his manuals and identification, was repeatedly told he was off the payroll, and denied

transportation to his home base demonstrates he was terminated by SEAL. Thus, the events above are sufficient to establish Mr. Hirst suffered the adverse personnel action of termination of his employment.

Second, the undersigned finds Captain Malone had authority to terminate Mr. Hirst. Captain Malone testified he lacked authority to terminate SEAL employees, but had the power to recommend terminations when a situation required it. (Tr, p. 483). Captain Malone also testified it was never his intention to terminate Mr. Hirst's employment during their September 29th telephone conversation. The undersigned finds Captain Malone lacks all credibility as a witness and found it painful to watch him contradict himself on the stand. Captain Malone testified he had no authority to fire employees, but later admitted to firing a pilot named Nick Rougas. (Tr, p. 514). Captain Malone testified it was standard operating procedure to collect an employee's identification and manuals preceding a disciplinary interview, but then later admitted to instructing Pilot Nick Rougas to turn in his identification and manuals before firing him. [1] (Tr, p. 499). Captain Malone also denied knowledge of any Letters of Investigation issued regarding overweight operations, and then admitted to having a discussion with Chief Lusk regarding the FAA's issuance of such letters. (Tr, pp. 521-523). Therefore, the evidence clearly demonstrates Captain Malone not only had the authority to terminate SEAL employees, but that he exercised this authority when he fired Mr. Hirst.[2]

Third, SEAL's argument that Mr. Hirst voluntarily quit due to his failure to indicate his intent to continue employment with SEAL is not persuasive. Mr. Hirst never quit or abandoned his position with SEAL. Rather, perceiving Captain Malone as having supervisory authority, he reasonably concluded he had been terminated when asked to turn in his company identification and manuals. Once SEAL realized Captain Malone terminated Mr. Hirst in violation of the Act and regulations, it attempted to escape potential liability by circumventing the events and telling Mr. Hirst that he had not been fired, and that his position was still available. SEAL then confirmed in writing its position that Mr. Hirst remained employed and requested a reply with his intentions within three days. (RX 2). However, the letter inquiring whether Mr. Hirst intended to return to work remained in SEAL offices for five days before it was sent. (Tr, p. 421). Upon receipt, Mr. Hirst replied to SEAL that he reasonably believed his employment was terminated. (RX 3). Had SEAL truly believed Mr. Hirst was still an employee, and valued his prompt return, a letter would have been sent immediately. Thus, the evidence demonstrates SEAL's purported offer was not bona fide and only asserted to circumvent liability.

Therefore, the evidence conclusively proves SEAL terminated Mr. Hirst's employment, constituting an unfavorable personnel action.

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[1] While it may be standard operating procedure to collect an employee's identification and manuals prior to a disciplinary interview, the circumstances in this case establish that the procedure is also implemented when an employee is terminated.

[2] SEAL argues Mr. Hirst's illegally recorded September 29, 2002 conversation with Captain Malone is inadmissible. The undersigned acknowledges that the electronic recording of oral communications without the consent of all parties is prohibited in the state of Florida. However, the undersigned rules the taped conversations are admissible as there is no substantial difference in the recollections of the conversation and both party's testimony prove the content of the conversation. Additionally, the decision in this case would be the same even without the tapes given the lack of Captain Malone's credibility. Therefore, the undersigned rules the September 29, 2002 taped conversations are admissible.

Protected Activity as a Contributing Factor in Adverse Employment Action

Mr. Hirst has established that he engaged in protected activity in September of 2002 and was subjected to an adverse employment action by SEAL. He must now establish that the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. §1979.109(a). In ERA employee protection cases, the connection between protected activity and adverse employment action may be based on circumstantial evidence or discriminatory intent. *See Frady v. Tenn. Valley Auth.,* 92-ERA-19 and 34 (Sec'y Oct. 23, 1995) slip op. at 10n; *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d at 1162 (9th Cir. 1984), quoting, *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980).

Temporal proximity may be sufficient to raise an inference of causation in a whistleblower matter. *Tracanna v. Arctic Slope Inspection Serv.*, 1997-WPC-1 (ARB July 31, 2001). When two events are closely related in time it is often logical to infer that the first event (e.g. protected activity) caused the last (e.g. adverse action). *Id.* at 8. The causal connection can be severed by a significant length of time or by some legitimate intervening event. *Tracanna*, slip op. at 7-8. However, temporal proximity alone is insufficient to meet Complainant's ultimate burden of proof. Mr. Hirst must establish that the events on September 29, 2002, contributed to his termination. In order to constitute a "contributing factor" the protected activity must only tend to affect in any way the outcome of the decision. *Davis*, 2001-AIR-5 at 32.

In light of the evidence in the record, the undersigned finds Mr. Hirst has established that his protected activity contributed to his termination. The evidence reflects SEAL's adverse action followed close on the heels of Mr. Hirst's protected activity. On September 29, 2002, Mr. Hirst made an internal complaint to Captain Malone regarding the legality of flying the aircraft at the increased weight of 108,000 pounds. (Tr, pp. 372-374). On the same day, Captain Malone terminated Mr. Hirst as he advised him to turn in his company manuals and identification. The actual relinquishment occurred in a meeting one day later. There were no intervening events to sever the causal connection, as Mr. Hirst's protected activities met prompt hostile responses from SEAL. Therefore, the necessary nexus was present between the activity and adverse action.

Thus, the undersigned finds the circumstances were sufficient to raise the inference that Mr. Hirst's protected activity was a contributing factor in the unfavorable action.

SEAL's Showing of Non-Discriminatory Motive

As Mr. Hirst demonstrated that his protected activity contributed to SEAL's adverse employment actions, SEAL has the burden to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. 49 U.S.C. §42121(b)(2)(B)(iv). Relief may not be ordered if the Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of the protected activities. 29 C.F.R. § 1979.109(a).

SEAL maintains Mr. Hirst did not suffer from an adverse employment action because he voluntarily quit. Likewise, SEAL did not produce evidence that any adverse action was motivated by a legitimate, non-discriminatory reason. Thus, it is unnecessary for the undersigned to analyze this component in the burden of proof standards (*viz.* whether SEAL demonstrated that it would have taken the same unfavorable personnel actions in the absence of the protected activities).

Therefore, based on the evidence in the record and applicable law, the undersigned finds SEAL violated the Act, entitling Mr. Hirst to relief.

IV. Relief

29 C.F.R. §1979.109(b) (2003) states:

> If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

Back pay

Complainant seeks economic damages (including back and/or front pay) for the wages and per diem income lost from the time of his termination with SEAL to the time he regained full employment as a professional pilot in May of 2003, an interval of 10 months, equating to $55,000. On the other hand, SEAL argues Mr. Hirst's refusal to accept what he perceived as an offer of reinstatement severely limits any damages to which he is allegedly entitled. SEAL further contends Mr. Hirst's refusal of the perceived offer of reinstatement was utterly unreasonable, and that any back pay should be limited from September 29, 2002 to October 1, 2002, the period of his alleged termination before receiving the purported offer of reinstatement. However, since Hirst was paid through the middle of October, SEAL argues there should be no back pay at all.

The Act and its implementing regulations clearly provide for the award of back pay. 49 U.S.C. §42121(b)(3)(B)(ii); 29 C.F.R. §1979.109(b). The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on the earnings the employee would have received but for the discrimination. *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991). A complainant has the burden of establishing the amount of back pay that a respondent owes. *See Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec'y July 19, 1993). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587

(2d Cir. 1976)(quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975)). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997).

Additionally, the Supreme Court has held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential back pay liability." *Ford Motor Co. v. EEOC,* 458 U.S. 219, 241 (1982); *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1012 (5th Cir. 1989). The rejection of an unconditional offer of reinstatement, however, will not toll back pay liability where a special circumstance or valid reason exists for refusal of that offer. *Naylor v. Georgia-Pacific Corp.*, 875 F. Supp. 564, 581 (N.D. Iowa 1995). The issue, therefore, becomes whether an objective, reasonable person would have refused the offer of reinstatement. See *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982)). The burden of proving an offer of reinstatement was made and that rejection of it was objectively unreasonable rests squarely on the shoulders of Respondent. *See Smith v. World Ins. Co.*, 38 F.3d 1456, 1465 (8th Cir. 1994); see also *Maturo v. National Graphics, Inc.,* 722 F. Supp. 916, 928 (D. Conn. 1989).

The undersigned finds Mr. Hirst reasonably rejected SEAL's purported offer of reinstatement and is entitled to back pay in the amount of $55,000. An objective, reasonable person in Mr. Hirst's situation would have rejected SEAL's offer of reinstatement. SEAL's "offer" was not bona fide. Had SEAL voluntarily made a bona fide offer of reinstatement, Mr. Hirst's rejection of the offer would have terminated back pay. *See Asst. Secretary and Zessin v. ASAP Express, Inc.,* 92-STA-33 (Sec'y Jan. 19, 1993), slip op. at 14; *Phillips v. MJB Contractors,* 92-STA-22 (Sec'y Oct. 6, 1992), slip op. at 4-5. However, SEAL's offer was made only after realizing Captain Malone's action of terminating Mr. Hirst violated the Act and implementing regulations. Furthermore, SEAL has made no indication that there would be any change in its practices, indicating Mr. Hirst would likely encounter the same work environment that existed when terminated. Therefore, as no reasonable person would accept reinstatement under these conditions, a determination of backpay is necessary.

Accordingly, reinstatement does not apply to the case at hand and Mr. Hirst is entitled to back pay from the date of termination on September 29, 2002, until he obtained new employment in May of 2003, plus lost per diem, totaling $55,000.

Interest

Mr. Hirst also seeks interest on back pay recovered. A back pay award is designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of the time elapsed during adjudication of the complaint. *See Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990) (where employer has the use of money during the period of litigation, employer is not unfairly prejudiced); *Blackburn v. Metric Constructors,*

Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). Claimant's request for interest on back wages is hereby awarded.

ORDER

IT IS HEREBY ORDERED that:

1. SEAL shall pay Mr. Hirst back pay in the amount of $55,000.

2. SEAL shall pay Mr. Hirst interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by Section 6221 of the Internal Revenue Code, 26 U.S.C. § 6221;

3. SEAL shall pay Mr. Hirst all costs and expenses, including attorney's fees, reasonably incurred in connection with this proceeding. Thirty days is hereby allowed to Complainant's counsel for submission of an application for attorney's fees. A service sheet showing that service has been made upon Respondent must accompany the application. Respondent has ten days following receipt of such application within which to file any objections. It is requested that the petition for services and costs clearly state (1) counsel's hourly rate and supporting documentation thereof, and (2) a clear itemization of the complexity and type of services rendered.

Russell D. Pulver
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate

Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).

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Russell Pulver
Administrative Law Judges